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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

SURPLUS TRADING COMPANY, *Plaintiff in Error,*

v.

No. [redacted] 2

J. M. HAYATS, AS SHERIFF AND EX-OFFICIO COLLECTOR OF TAXES FOR PULASKI COUNTY, ARKANSAS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OPPOSING MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR

G. B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
A. W. DOBYNS,
A. F. HOUSE,
Solicitors for Plaintiff in Error.

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v. No. 33.

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BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

Plaintiff in Error submits that the decree of the Supreme Court of Arkansas (R. 87, 95) to which the Writ of Error herein is directed, is a *final* decree, and a proper one to invoke the jurisdiction of this court by Writ of Error.

I. SIGNIFICANT PORTION OF DECREE OF SUPREME COURT OF ARKANSAS.

"It is further ordered and decreed that the decree of said chancery court in this cause rendered, in so far as the complaint applies to the taxes of the year

1922, be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said chancery court with directions to enter a decree allowing the sheriff and collector of Pulaski County to recover of the said appellee, Surplus Trading Company, the amount of taxes and penalty for the year 1922" (R. 87).

II. SIGNIFICANT PORTION OF OPINION OF SUPREME COURT OF ARKANSAS.

"The result of our views is that the chancellor should have held the assessment for the year 1923 to be illegal and void and properly restrained the sheriff from collecting any amount of taxes from the Surplus Trading Company under it. The chancery court, however, erred in holding that the sheriff and collector was not entitled to recover the taxes for the year 1922 and the penalties provided by the statute as indicated in the opinion.

"Therefore, the decree will be reversed and the cause will be remanded with directions to allow the sheriff and collector to recover against the Surplus Trading Company the amount of taxes and penalties for the year 1922. It is so ordered" (R. 95).

III. SIGNIFICANT PORTIONS OF AMENDED COMPLAINT.

"That the Assessor of Taxes for Pulaski County, Arkansas, under and by virtue of the laws of the State of Arkansas, assessed, for the purpose of taxation for the year 1922, all personal property owned by the defendant, Surplus Trading Company, and situated within the State of Arkansas, and particularly within the county of Pulaski in said State, in the amount and sum of one hundred thirty-five thousand ($135,000) dollars.

"That there was due on the 10th day of April, 1923, as taxes on said property the sum of four thousand six hundred seventy-three and 26/100 ($4,673.26) dollars, for the year 1922.

"That the said sum of four thousand six hundred seventy-three and 26/100 ($4,673.26) dollars, having remained past due and unpaid on and after the 10th

day of April, 1923, there is now due, in addition to the said sum, the following sums:

"First. Due as penalty for failure to assess said property for the purpose of taxation, the sum of eight hundred sixty-five and 25/100 ($865.25) dollars.

"Second. Due for failure to pay said tax on said property on or before the 10th day of April, 1923, the sum of eleven hundred sixty-eight and 32/100 ($1,168.32) dollars.

"Third. Due as collector's costs for failure to pay said taxes on said property on or before the 10th day of April, 1923, one and 25/100 ($1.25) dollars.

"That there now remains past due and unpaid as taxes, penalties and costs for the year 1922 upon the property of the Surplus Trading Company the sum of six thousand seven hundred eight and 8/100 ($6,708.08) dollars" (R.14). * * * * * * * * * * *

"Wherefore, plaintiff asks * * * that the State of Arkansas and her various political subdivisions have judgment against the defendant, Surplus Trading Company, in the amount and sum of six thousand seven hundred eight and 8/100 ($6,708.08) dollars, for taxes, penalties and costs for the year 1922" (R. 17). *

"DEMAND

"Demand is hereby made on you, and each of you individually, collectively and as members of and composing the Camp Pike Honorary Commission and the Camp Pike Disposals Board, that you forthwith pay to me, as sheriff and collector of Pulaski County, Arkansas, the amount of taxes, penalties and costs, due me as such collector of Pulaski County, Arkansas, for the year 1922, due and payable by the Surplus Trading Company; said amount of taxes, penalties and costs being as follows:

Amount of taxes	$4,673.26
Penalty for non-assessment	865.25
Penalty for non-payment	1,168.32
Costs	1.25
"Total amount due	$6,708.08

"Dated this 26th day of May, 1923."

(Exhibit C to amended complaint. R. 18-19).

IV. AUTHORITIES AND ARGUMENT.

The only ruling cited by Defendant in Error, in support of his prayer for dismissal of the Writ of Error herein, is *Schlosser* v. *Hemphill,* 198 U. S. 173. In that case the Iowa Supreme Court reversed the decree of the trial court and remanded "for further proceedings in harmony with the opinion of this court" (198 U. S. 175). This court properly held that the decree was not final because "no decree was entered in the Supreme Court, and no specific instruction was given to the court below" (198 U. S. 176).

That the Iowa Supreme Court contemplated further proceedings is unmistakably shown. In the case at bar, a far different situation presents itself, because the controversy is terminated, and there is no intimation of further proceedings, and simply the direction "to enter a decree allowing the sheriff and collector of Pulaski County to recover of the said appellee, Surplus Trading Company, the amount of taxes and penalty for the year 1922."

The decree refers to the complaint evidently for the purpose of designating the portion of the decree of the lower court to be reversed, and the liquidated amount of the decree directed to be entered.

The holding in *Schlosser* v. *Hemphill, supra,* was bottomed on *Haseltine's case* (*Haseltine* v. *Central Bank of Springfield, Mo.* (*No.* 1) 183 U. S. 130) and in the latter case the first paragraph of the opinion is as follows:

> "The motion to dismiss must be granted. We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. The case of *Mower* v. *Fletcher,* 114 U. S. 127, is not in point, as the judgment of the Supreme Court of the State remanded that case to the inferior court with an order to enter a specified judgment, nothing being left to the judicial discretion of the court below. A like ruling was made in *Atherton* v. *Fowler,* 91 U. S. 143, and *Commissioners of Tippecanoe County* v. *Lucas,* 93 U. S. 108" (183 U. S. 131).

The opinion of this court in *Haseltine's case, supra,* clearly distinguishes *Mower* v. *Fletcher,* 114 U. S. 127. Plaintiff in error takes the liberty of quoting in full the short opinion in the last mentioned case as its affirmative argument in opposition to the motion before the court.

"Mr. Chief Justice Waite delivered the opinion of the court.

"These motions are made on the ground that the judgments for the review of which the writs of error were sued out are not final judgments. The judgment in each case is that the judgment of the State District Court 'be, and the same is hereby, reversed, with costs, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint.'

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to be done to complete the litigation.

"The motion in each of the cases is overruled."

See also *Rio Grande Railway Co.* v. *Stringham*, 239 U. S. 44, 47, and *North Carolina Railroad Company* v. *Story*, 268 U. S. 288, 291.

CONCLUSION

It is respectfully submitted that the Motion to Dismiss is without merit, and should be overruled.

G. B. Rose,
D. H. Cantrell,
J. F. Loughborough,
A. W. Dobyns,
A. F. House,
Solicitors for Surplus Trading Co., Plaintiff in Error.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OPPOSING MOTION OF DEFENDANT IN ERROR TO AMEND RECORD

G. B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
A. W. DOBYNS,
A. F. HOUSE,
Solicitors for Plaintiff in Error.

PARKIN PTG. & LITH. CO., LITTLE ROCK

IN THE

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SURPLUS TRADING COMPANY.....*Plaintiff in Error,*

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J. M. HAYNIE, AS SHERIFF AND EX-OFFICIO COLLECTOR OF TAXES FOR PULASKI COUNTY ARKANSAS.....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OPPOSING MOTION OF DEFENDANT IN ERROR TO AMEND RECORD

BRIEF

Plaintiff in error submits that the agreed statement of facts constituting a part of the record in this cause (R. 77-86) speaks the truth; that it cannot be amended in this court; and that further proof should not be taken in this cause.

I.

The primary prayer for relief in the pending motion is for "an order amending the agreed statement of facts set forth in the record herein to speak the truth as to the manner in which the United States acquired title to the land in question." This is merely an effort to introduce

evidence in this court to change the record on which the case was tried and decided by the State courts. Nothing out of the record certified to this court can be taken into consideration.

Home for Incurables v. *City of New York*, 187 U. S. 155.

Telluride Power Transmission Co. v. *Rio Grande Ry. Co.*, 175 U. S. 639.

Goodenough Horseshoe Mfg. Co. v. *Rhode Island Horseshoe Co.*, 154 U. S. 635.

Spies v. *Illinois*, 123 U. S. 131, 182.

II.

In this motion, counsel for defendant in error, speaking entirely outside the record, have made erroneous statements and insinuations regarding the facts surrounding the preparation of the agreed statement of facts in question. For the information of the court, and for the purpose of rebutting what is apparently an attempt to reflect upon counsel for plaintiff in error, the liberty is taken of presenting the following particulars, which likewise are not found in the record.

The agreed statement of facts was entered into with J. C. Marshall, Esq., as chief counsel of record representing plaintiff in the State trial court. An identical agreed statement of facts was entered into at the same time, with the same attorney, in connection with another litigation wherein Mr. Marshall was also chief counsel for the plaintiff in the trial court. (See *Adkins* v. *Kalter*, 171 Ark. 1111).

Mr. Marshall was a stockholder in Army Post Development Company, as appears from the certificate of the Pulaski County Clerk (Appendix). He died October 27, 1926, after the trial of this suit in the trial court.

The purpose of the agreed statement of facts was to obviate the necessity of taking extended proof regarding the status of the land composing Camp Pike Military Reservation. War Department records were not examined,

nor was any representation made to the effect that they were. Access was not permitted to such records according to the Adjutant General's Department in Washington, except by following the provisions of "Compilation of office Memoranda A. G. O. 1-2-24," dealing with record information for use in legal controversies, pages 63-71, inclusive.

The lands in fee simple comprising Camp Pike Military Reservation were acquired by four methods, to-wit:

(1) Where cash was paid by the United States to individual landowners. About 2,800 acres were obtained in this manner.

(2) Where condemnation proceedings were instituted in Federal Court and cash paid by the United States into the registry of the court for the individual landowners, whose lands were condemned. About 250 acres were acquired in this manner.

(3) Where condemnation proceedings were instituted in Federal Court and cash paid by Army Post Development Company into the registry of the court for the individual landowners whose lands were condemned. About 100 acres were acquired in this manner.

(4) Where lands were conveyed by warranty deed by Army Post Development Company, the United States making no cash payment therefor. (See deed in printed motion of defendant in error as Exhibit 1 in the Appendix thereto).

There can be no question but that these different methods of acquisition of land constitute *purchases* within the meaning of that word as it appears in U. S. Constitution, Article 1, Section 8, par. 17, and as same appears in Act 180 of the General Assembly of Arkansas of 1903 (Appendix).

We infer that the argument of defendant in error is that unless money was paid by the United States there could be no *purchase*. This is untenable. It is established

that the acquisition of title by condemnation proceedings is included within the term *purchase*.

Ft. Leavenworth Railroad Co. v. *Lowe*, 114 U. S. 525.

United States v. *Beaty*, 198 Fed. 284.

United States v. *Whipple Hardware Co.*, 191 Fed. 945.

The fact that Army Post Development Company made payment of the money necessary to obtain the vesting of title does not affect the above holding. "The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another."

Kohl v. *United States*, 91 U. S. 367, 373.

The word *purchase* in the United State Constitution and in the Arkansas statute is used in its more extended legal meaning, as including every mode of acquiring title to real estate other than by descent.

"Purchase, in its enlarged and legal signification, means the acquisition of real property by any voluntary act of the parties as distinguished from title by descent, which result from the operation of the law." *Chicago & E. I. R. Co.* v. *Doyle*, 256 Ill 514.

See also:

McMahon v. *School District No. 66 of Antelope County*, 80 Neb. 156.

Semi-Tropic Spiritualists' Ass'n v. *Johnson*, 163 Calif. 639.

Bailey v. *Henry*, 125 Tenn. 390.

Bartlett v. *City of Lowell*, 201 Mass. 151.

The deed which appears in the Appendix to defendant in error's motion contains the nominal consideration of $1, which is enough to pass fee simple title to the United States. *Jenkins* v. *Pye*, 12 Pet. 241. However, the consideration for a deed of land may be something other than money; and in regard to the conveyance in question it

may well be said that in return for the same the United States took possession of and improved the lands, which was the benefit and consideration desired by Army Post Development Company.

Roberts v. *Northern Pacific Railroad Co.*, 158 U. S. 1.

Little Rock Chamber of Commerce v. *Pulaski County*, 113 Ark. 443.

III.

This cause appears in the published reports as *Haynie* v. *Surplus Trading Company*, 174 Ark. 507. Proceedings were instituted in the State trial court on July 19, 1923, the agreed statement of facts being made a part of the record therein on June 4, 1925, and a decree entered June 7, 1926 (R. 26). On appeal to the State appellate court, there was a decree on June 27, 1927 (R. 87), same becoming final on September 26, 1927 (R. 96) when petitions for rehearing filed by both appellant and appellee in that court were severally overruled. The filing date of the record in this court is December 27, 1927, and the plaintiff in error filed its brief in April, 1928. On September 19, 1928, printed copy of Motion to Dismiss and Brief in support thereof was sered on plaintiff in error and the Opposition Brief was served on counsel for defendant in error on October 3, 1928. On October 6, 1928, printed copy of this Motion to Amend the Record was served upon counsel for plain tiff in error. It would seem that the delay in filing this motion constitutes a valid ground for its denial, as a matter of discretion, by this court. *Sandford and Brooks* v. *U. S.*, 267 U. S. 455, 457.

CONCLUSION

It is respectfully submitted that the pending motion is without merit and should be overruled.

G. B. Rose,
D. H. Cantrell,
J. F. Loughborough,
A. W. Dobyns,
A. F. House,
Solicitors for Surplus Trading Co.

APPENDIX

CERTIFCATE

State of Arkansas,
County of Pulaski.

I, W. S. Rogers, Clerk of the County Court of Pulaski County, Arkansas, do hereby certify that all articles of incorporation, and corporation annual reports located in Pulaski County, Arkansas, are filed and recorded in my office.

That Record Book W, pages 77 to 85, referred to in the annual report filed by the Army Post Development Company on the 9th day of June, 1922, shows a list of stockholders, and among other stockholders in said list appears the name of J. C. Marshall, as being a subscriber to one share of the capital stock of the Army Post Development Company, said name appearing at page 81 in the Record Book aforesaid.

Given under my hand and seal of said court on this 8th day of October, 1928.

W. S. Rogers, Clerk,

(Seal) By (signed) Fred Adair D. C.

ACT 180

"An act granting the consent of the State of Arkansas to the Government of the United States to purchase sites for public buildings in this State, and ceding jurisdiction to the United States over same.

"Section 1. State consents to purchase by United States of any land in this State to be used for certain purposes, and grants jurisdiction over same.

"2. State releases her right to tax such site and improvements thereon.

"3. Acts in conflict repealed, and act in effect from passage.

"Be it Enacted by the General Assembly of the State of Arkansas:

"Section 1. The State of Arkansas hereby consents to the purchase to be made or heretofore made, by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, custom-house, lighthouse, lock, dam, fish hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this State, within and over all grounds thus purchased by the United States, within the limits of this State, is hereby ceded to the United States.

"Provided, that this grant of jurisdiction shall not prevent execution of any process of this State, civil or criminal, upon any person who may be on said premises.

"Section 2. This State releases and relinquishes her right to tax any such site, grounds or real estate, and all improvements which may be thereon or thereafter erected thereon, during the time the United States shall be and remain the owner thereof.

"Section 3. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force on and after its passage. Approved April 29, 1903" (Acts Ark. 1903, p. 346-7).